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IN THE

Supreme Court of the United States

October Term, 1968.

No. 1419

H. K. PORTER COMPANY, INC.,

Petitioner,

v.

UNITED SAW, FILE AND STEEL PRODUCTS WORKERS OF AMERICA, FEDERAL LABOR UNION NO. 22254, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Statutes and Rules:

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REPORTS OF OPINIONS BELOW.

The opinion of August 4, 1960 of Judge John W. Lord, Jr. of the United States District Court for the Eastern District of Pennsylvania is reported at 190 F. Supp. 407 (E. D. Pa. 1960), and is printed herein as Appendix A.

The Order on this opinion entered April 11, 1961, following appeal as to form is unreported, and is printed herein as Appendix B.

The Decision and Award of Arbitrator W. Roy Buckwalter dated August 17, 1962 is unreported, and is printed herein as Appendix C.

The opinion of Judge John W. Lord, Jr. of May 10, 1963 is reported at 217 F. Supp. 161 (E. D. Pa. 1963), and is printed herein as Appendix D.

The opinion of June 19, 1964 of Circuit Judge Forman of the Court of Appeals for the Third Circuit is reported at 333 F. 2d 596 (3rd Cir. 1964), and is printed herein as Appendix E.

The Order and Judgment of December 7, 1964 of Judge John W. Lord, Jr. of the United States District Court for the Eastern District of Pennsylvania is unreported, and is printed herein as Appendix F.

The Opinion and Award of Arbitrator Donald A. Crawford dated April 15, 1967 is unreported, and is printed herein as Appendix G.

The Memorandum Opinion and Order of April 4, 1968 of Judge John W. Lord, Jr. is reported at 283 F. Supp. 739, 68 LRRM 2202 (E. D. Pa. 1968), and is printed herein as Appendix H.

The opinion of January 10, 1969 of Judge Freedman of the Court of Appeals for the Third Circuit is reported at 406 F. 2d 643, 70 LRRM 2385 (3rd Cir. 1969), and is printed herein as Appendix I.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 10, 1969. Court of Appeals Record, item 7, 8; Appendix I, *infra*. Rehearing was denied on February 20, 1969. Court of Appeals Record, item 10. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

I. Did the Court of Appeals err in holding that a provision of the collective bargaining agreement limiting arbitration in pension matters to eligibility does not exclude from arbitration a further dispute as to when eligible employees' rights to payment accrued.

II. Whether a finding by the District Court based on supporting evidence may be set aside, contrary to the mandate of Rule 52, F. R. C. P.

III. Whether the federal labor policy requires that a party who participates in arbitration of issues of contested arbitrability be precluded from review of an award on such issues.

IV. Whether an award ordering payment of pensions to eligible employees without regard to their age may be enforced, where the collective bargaining agreement obligates the employer to pay pensions only to eligible employees who have reached age 65.

STATUTES AND RULE INVOLVED.

The statutes involved are Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. § 185(a):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties;

and Section 203(d) of the Labor Management Relations Act of 1947, 61 Stat. 153, 29 U. S. C. § 173(d):

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

The Rule involved is Rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. Rule 52(a):

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the

grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT.

A 1957 Collective Bargaining Agreement between Petitioner ("Porter") and Respondent ("Union") provided pension benefits for eligible employees integrated with Social Security benefits. Porter contracted to pay a basic yearly pension allowance to each retired employee who had reached the age of 65 with at least 25 years of continuous service with the company.*

> The pension section specifically provided that:
> [p]roblems of eligibility within the terms of this pension plan that cannot be solved by this Pension Committee shall be the only pension problems subject to arbitration.

The Contract elsewhere provided for arbitration of grievances of individuals or groups, with the parties reserving "broad labor policies or plant-wide wage adjustments" from the scope of their arbitration agreement.

The underlying dispute arose in 1959 when Porter announced its intention to move a substantial part of its production facilities in Philadelphia to Danville, Virginia. The Union claimed pension rights and severance pay for employees whose employment would be terminated by such move, and when no agreement was reached a grievance was filed.

In the ten years since the filing of the original grievance, aspects of this dispute have been considered by two arbitrators and on three occasions by both the District Court for the Eastern District of Pennsylvania and the Court of Appeals for the Third Circuit.

The present status, and the decision for which review is sought by this Petition, is the Order of the Court of Appeals of January 10, 1969. That decision directs enforcement of an arbitrator's award which, in part, orders

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* Pertinent provisions of said contract appear in Appendix J.

immediate payment of pensions from date of termination to employees who had completed 25 years of service, without requiring that they first attain age 65; and awards pensions to a group of employees who had completed 24 years of service at termination payable upon completion of their 25th year (by exercise of the contract's seniority provision), again without requiring that they attain age 65. Some of the employees concerned were as young as 42 years of age at termination.

Enforcement of this award contravenes the substantive pension provisions and disregards the specific limitation that the only pension problems subject to arbitration are problems of eligibility.

The waystops between the filing of the grievance and the decision of the Court of Appeals which is the basis for this petition are as follows:

1. Porter objected to the arbitrability of the original grievances primarily on the ground that they constituted "broad labor policies" and were, therefore, excluded from arbitration. Following this Court's *Steelworkers* decisions,[1] however, the District Court directed arbitration. *United Saw Workers v. H. K. Porter Company, Inc.*, 190 F. Supp. 407 (E. D. Pa. 1960) (Appendix A, *infra*).

An appeal followed as to the form of the Order and the United States Court of Appeals for the Third Circuit on March 24, 1961 issued its Order No. 13439, settling the terms, pursuant to which the District Court entered the following Order:

> . . . that defendant is hereby ORDERED to conform and comply with Sections III and IV of the Collective Bargaining Agreement between itself and the plaintiff, to

1. *United Steelworkers of America v. American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf N. Co.*, 363 U. S. 574 (1960); *United Steelworkers of America v. Enterprise W. & C. Co.*, 363 U. S. 593 (1960).

select an Impartial Chairman and to submit to arbitration, subject to the provisions of the Collective Bargaining Agreement, the grievances with respect to pensions and severance pay insofar as such grievances arise under the provisions of the Collective Bargaining Agreement and constitute claimed violations thereof . . . (Appendix B, *infra*).

2. Thereafter, arbitration proceeded before Professor W. Roy Buckwalter who, on August 17, 1962, issued the following award:

> 1. Each employee who, at the time he was terminated, had completed twenty-five years of service or more, but had not reached age sixty-five shall be paid a full pension.
>
> The formula for payment to be worked out by H. K. Porter Company and the Union.
>
> Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.
>
> 2. Each employee who, at the time he was terminated had reached age sixty-five, but had not completed twenty-five years of service shall be paid a pro rata pension based on an equitable formula to be worked out by H. K. Porter Company and the Union.
>
> Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.
>
> 3. The request for pensions for employees who, at their termination, had not reached age sixty-five and who had not put in twenty-five years of service is denied. (Appendix C, *infra*).

3. Porter's efforts to have the Buckwalter award vacated were unsuccessful in the District Court. *H. K. Porter Company, Inc. v. United Saw Workers,* 217 F. Supp. 161 (E. D. Pa. 1963) (Appendix D, *infra*). The Court of Appeals affirmed as to Part 1 of the award, where in some 20 instances Porter's predecessor had waived the requirement of continuous service. But no such prior practice existed to justify Part 2 of the award, and therefore enforcement of that part was reversed. The case was remanded with instructions to enter judgment in favor of Porter insofar as Part 2 of the award was concerned. *H. K. Porter Company, Inc. v. United Saw Workers,* 333 F. 2d 596 (3rd Cir. 1964) (Appendix E, *infra*).

4. On December 7, 1964, the District Court entered an Order and Judgment which had been submitted by the parties. This Order and Judgment provided in part:

> 1. The Motions for summary judgment of plaintiff and defendant are granted in part and denied in part.
>
> 2. The arbitration award of Professor W. R. Buckwalter is hereby enforced as to paragraph 1 thereof . . .
>
> 3. Paragraph 2 of the arbitration award of Professor W. R. Buckwalter is vacated and declared void and unenforceable . . .
>
> 4. This Court shall retain jurisdiction of the parties to and subject matter of this action under Section 301 of the Labor Management Relations Act of 1947. In the event differences or disputes arise between the parties as to the interpretation and application and/or the method of enforcement, including the formula for payment, of the terms of paragraph 1 of the arbitration award as quoted above, then either party shall apply to this Court

under the above caption for such action as it deems appropriate. (Appendix F, *infra*).

5. At this stage, a class of employees undetermined in number who had 25 or more years of service at termination of their employment had been found to be eligible for pensions by the Buckwalter award as enforced by the Court of Appeals. Buckwalter, perhaps recognizing the contractual limitation on his authority as arbitrator, had framed the phrase "formula for payment" which he had suggested be worked out by the parties. The District Court had retained jurisdiction so that either party might apply for appropriate relief if such formula could not be worked out.

Many problems remained unresolved; some were problems of eligibility while some were not. The Union's claims included:

(a) employees found to be eligible under Part 1 of the Buckwalter award should be paid their full pensions effective as of the time of their termination;

(b) the contractual provisions for the minimum guaranteed pension were applicable in calculating the amount of each pension;

(c) the estates of eligible employees who had died since termination but prior to attaining age 65 should receive pension and insurance payments;

(d) employees who had concluded 24 years of service at termination were eligible under the Buckwalter award to receive full pensions upon completion of their twenty-fifth year of continuous service under the seniority provisions of the contract;

(e) four employees [Holmes, Shuttleworth, Norcross and Affatato] who had voluntarily left their employment prior to termination were eligible employees under Part 1 of the Buckwalter award;

(f) the pensions for eligible employees should be funded and administered jointly by Union and Management. (Appendix G, *infra*, p. 75a).

No application was made at this time to the District Court under its December 7, 1964 Order and Judgment; rather, the parties without any written submission voluntarily appeared before a second arbitrator, Donald A. Crawford.

6. Hearings were held before Arbitrator Crawford on July 22 and 23, 1965. Briefs were submitted on November 5, 1965 with oral argument on November 16, 1965. At the outset of the hearing, counsel for the Union contended that the arbitrator was to decide all disputes relative to the Buckwalter award. Counsel for Porter sought to restrict the arbitrator's jurisdiction to matters of eligibility [colloquy set forth at length in transcript before Arbitrator Crawford, Appendix K, *infra*]. In its brief filed with the arbitrator on November 5, 1965, Porter stated in part:

> The Company submits here for decision by the Arbitrator the question of which persons are eligible within Part 1 of the Buckwalter award. The Company objects to the arbitrability of these grievances insofar as they go beyond problems of eligibility. There is no waiver on the part of the Company of any right to have such question of arbitrability resolved by the court. (Appellee Appendix 11b-12b, Court of Appeals Record, item 3).

7. On April 15, 1967, Arbitrator Crawford issued the following award:

> 1. Grievants who at time of termination had completed 25 years of continuous service are not required to wait to age 65 for pension payments

under the Buckwalter Award. The Company shall pay them full pensions effective as of the time of their termination.

2. In accordance with the Buckwalter Award, the pension allowance specified in Paragraph 1 and subsequent paragraphs of this Award shall be calculated under Section XX-D of the September 16, 1957 contract, as extended September 15, 1958, without actuarial reduction. The Union request for the application of the minimum guaranteed pension for the grievants is denied.

3. The Company shall pay the grievants the total of the past due pension payments as a lump sum, calculated with the addition of four percent interest, retroactively to the date of their termination.

4. Grievants who at time of termination had completed 25 years of continuous service but have since died before reaching age 65 were eligible under the Buckwalter Award for pension payments at time of termination. The Company shall pay their estates the sum of the full monthly pension payments from time of their termination to their death.

5. Grievants who at the time of termination had completed 24 years of continuous service are eligible under the Buckwalter Award to receive full pension payments upon the completion of their 25th year of continuous service. The Company shall pay them full pensions effective as of the completion of their 25th year of continuous service.

6. George Holmes and Henry Shuttleworth were terminated employees rather than quits and are therefore eligible under Paragraph 1 of the Buck-

walter Award. The Company shall pay them full pensions effective as of time of termination.

7. The grievants who are eligible for pensions under the Buckwalter Award also qualify for a $1,000 non-contributory life insurance policy as of the first of the month following their becoming eligible for pension payments and for the duration of their pensioned retirement. The Company shall pay the estates of deceased grievants the benefits due under the life insurance policy.

8. Howard Norcross and John Affatato were voluntary quits rather than terminated employees. They are therefore not eligible for pensions under Paragraph 1 of the Buckwalter Award.

9. The Union request for funding and joint administration of the pension plan is denied. (Appendix G, *infra*, pp. 112a-113a).

8. The District Court on April 4, 1968, pursuant to Porter's motion, vacated substantial portions of the award as follows:

Paragraph 1 of the Crawford Award is vacated in its entirety. The arbitrator exceeded his authority in ruling on 'time of payment.' This dispute was only adjustable by the parties or, of course, by this Court under its Order and Judgment. As such, I hold that grievants who at the time of termination had completed 25 years of continuous service are required to wait until age 65 for pension payments.

Paragraph 2 is upheld only insofar as it denies the Union request for the application of the minimum guaranteed pension for the grievants. Calculation of the benefits "without actuarial reduc-

tion" pertains to "method of payment" and as such was not a proper subject for arbitration.

Paragraph 3, likewise, goes to method of payment and is thus vacated as it is outside the scope of arbitration.

Paragraph 4 must be vacated in its entirety. Again, the Arbitrator exceeded his authority in ruling on time for payment. Since, I have ruled that payments should commence at the age of 65 and since section 20.50 of the collective bargaining agreement provides that pension payments 'shall cease at the death of the employee,' an employee dying before his 65th birthday would forfeit his pension rights; nor would the estate of the decedent qualify for any of the payments.

Paragraph 5 is vacated in its entirety. While, the granting of pension benefits to grievants with only 24 years of service certainly goes to eligibility, it flies in the face of the Court of Appeals ruling that the 25 years of service requirement could not be dispensed with. The Buckwalter Award as enforced by this Court specifically requires 25 years of service.

Paragraph 6 is vacated insofar as it directs that Holmes and Shuttleworth should be paid full pensions prior to the time that each attains sixty-five years of age. In no case should any payments be made to any grievant prior to the time he reaches the age of 65.

Paragraph 7 will be enforced insofar as it pertains to eligibility. Thus, each employee who, at the time he was terminated, had completed twenty-five years or more of service, but had not

> yet reached age sixty-five qualifies for a $1,000 non-contributory life insurance policy as of the first of the month following his becoming eligible for pension payments, i.e. at the time he reaches the age of 65. Obviously, since a grievant doesn't qualify for the life insurance until he reaches his sixty-fifth birthday, if he dies before such date he cannot receive such a policy. Thus, that part of paragraph 7 pertaining to the payment of benefits under said policies to the estates of grievants who died prior to attaining sixty-five years of age is vacated.
>
> Paragraph 8 will be enforced as it pertains solely to eligibility.
>
> Paragraph 9 will be enforced. (Appendix H, *infra*, pp. 119a-121a).

The District Court found with that requisite positive assurance that Section XX precisely limited pension grievance arbitration to eligibility and that the time and method of payment of pension benefits was not an arbitrable problem of eligibility. Further, the court specifically found that Porter's participation in the Crawford arbitration proceeding was not an agreement to subject the formula for payment or the time and method of payment to arbitration. In the absence of an agreement to arbitrate, this dispute of course was for the Court to decide, with or without the earlier Order of December 7.

9. The Union's appeal followed. On January 10, 1969, the Court of Appeals reversed the District Court with directions to enter judgment enforcing the Crawford award. With regard to whether or not such award involved matters beyond eligibility, the court said:

> Section XX-B must be construed in the context of the unanticipated supervening act of the company in closing the plant which made it impossible for some of the employees to continue in service until attaining the age of sixty-five. As the agreement had been written, in the normal course of events an employee who had served for twenty-five years but had not yet reached the age of sixty-five could continue in his employment until both conditions were fulfilled, and would thereupon be 'eligible for pension.' Such eligibility automatically carried with it the right to immediate pension payments and there was no distinction in time between eligibility for pension and payment of pension benefits. Buckwalter, in awarding full pensions to employees who had served for twenty-five years but had not attained age sixty-five, held that they became eligible because the removal of the plant made impossible their continued service until they reached age sixty-five. Since the premature termination of their employment displaced the requirement that the employees must reach age sixty-five, the standard of eligibility was now altered and with it the time of accrual of the right to payment. The two questions, when an employee was entitled to pension and when the right to payment of pension benefits accrued, are at least so interwoven in the circumstances of this case that we cannot say that § XX-B alone requires their elimination from the scope of arbitration.' (Appendix I, *infra*, pp. 130a-131a).

The Court of Appeals did not find that the Crawford award drew its essence from the collective bargaining agreement or the common law of the shop; rather, the court looked solely for support to extra-contractual conduct of the parties:

If the authority for Crawford's decision may not be found in the collective bargaining agreement, it was clearly authorized by the definition of the scope of their dispute in paragraph 4 of the judgment which the parties transmuted into an arbitration. Such an agreement is, of course, valid and enforceable. Cf. Anaconda Co. v. Smeltermen's Union, — F. 2d — (9 Cir. 1968).

* * *

If the company is now required to submit to an award which goes beyond the literal meaning of § XX-B, it is because the closing of the plant was an unanticipated event for which the agreement made no provision. The issues which followed from this and the dispute regarding the Buckwalter award were submitted to Crawford without limitation. Where the parties bring to an arbitrator the full range of their dispute and express no reservation in their submission, the broad doctrine which favors the arbitration of labor disputes must be given full scope. (Appendix I, *infra,* pp. 132a-133a).

Porter's petition for rehearing was denied on February 20, 1969, with Judge Van Dusen dissenting. (Court of Appeals Record, item 10).

REASONS FOR GRANTING THE WRIT.

The writ should be granted because the Court of Appeals has reached an erroneous decision that is antagonistic to a significant aspect of the national labor policy. The decision below imposes an unwarranted impediment on the orderly administration of the labor arbitration process.

An understanding of what the Court of Appeals did and failed to do is imperative for recognition of the magnitude of the error committed.

First, the Court of Appeals held that time of payment and eligibility "are at least so interwoven in the circumstances of this case that we cannot say that § XX-B alone requires their elimination from the scope of arbitration." (Appendix I, *infra,* pp. 130a-131a).

Second, the Court of Appeals held that even if § XX-B excludes time and method of payment from arbitration, Porter voluntarily brought the dispute "within the realm of arbitration by agreeing to submit the dispute to Crawford." (Appendix I, *infra,* p. 131a).

Third, having thus resolved the question of arbitrability, the Court of Appeals refused to determine whether the award was authorized by the collective bargaining agreement. The court looked to neither that agreement nor any prior practice. Instead, it held that where the contract does not literally provide for a given situation which the parties take to arbitration, the federal labor policy requires enforcing any award whatsoever:

> If the company is now required to submit to an award which goes beyond the literal meaning of § XX-B, it is because the closing of the plant was an unanticipated event for which the agreement made no provision. The issues which followed from this and the dispute regarding the Buckwalter award were submitted to Crawford without limitation. Where the parties bring

> to an arbitrator the full range of their dispute and express no reservation in their submission, the broad doctrine which favors the arbitration of labor disputes must be given full scope. (Appendix I, *infra,* p. 133a).

Each of the elements of this decision was erroneous. Each such error impels the granting of the writ.

1. While doubts as to arbitrability are to be resolved in favor of coverage,[2] it is undoubted that:

> Under our decisions, whether the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties. *Atkinson v. Sinclair Refining Co.,* 370 U. S. 238, 241 (1962).

Porter's contract expressly provided that "the only pension problems subject to arbitration" should be problems of "eligibility."

It is undeniable that every pension problem presents the threshold question: is the employee for whom pension is sought eligible for pension. That question, and only that question, was agreed to be "subject to arbitration." All subsequent questions, such as amount, time of payment, method of payment, funding and joint administration, were thereby expressly excluded from arbitration. Porter reserved such questions as to its legal obligation for judicial determination. To refuse that judicial determination because eligibility is "interwoven" with accrual of the right to payment renders meaningless the contract exclusion, and makes a mockery of the promise in *Sinclair.*

2. The alternative basis on which the Court of Appeals determined all issues to be arbitrable is more serious error. Here the Court held that since Porter agreed to

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2. *United Steelworkers of America v. Warrior & Gulf N. Co.,* 363 U. S. 574, 583 (1960):

the form of judgment of December 7, 1964, and made no "express limitation" before proceeding with arbitration, Porter must be presumed to have included all disputes within the scope of the submission (Appendix I, *infra,* p. 131a).

Proof of such an agreement cannot be furthered by reference to the fact that the form of the Order and Judgment of December 7, 1964 was approved by the parties. Regardless of its author, it was the District Court's Order and Judgment, which it described as follows:

> The Order and Judgment of December 7, 1964 in no way enlarges the scope of authority given to an arbitrator by XX-B of the collective bargaining agreement. Under this Order and Judgment, this Court is the proper forum in which to decide disputes as to time and method of payment (Appendix H, *infra,* p. 119a).

Moreover, any reasonable requirement of "express limitation" was amply met. The Court of Appeals' statement of the facts recites that there was no prior agreement to submit all disputes to arbitration, and that at its first opportunity, "During the course of the hearings the company . . . objected to the decision of any problems beyond eligibility." (Appendix I, *infra,* p. 127a). In fact, as the first ten pages of the transcript of that hearing reveal,[3] five times it was suggested by counsel for the union and the arbitrator that all disputes were submitted for decision without limitation by the collective bargaining agreement. Each of those five times counsel for Porter rejected that suggestion and invoked the contractual limitation on arbitration. This was not to be a "resort to arbitration unrestricted at the outset."

3. Printed as Exhibit J, *infra.*

Rule 52 of the Federal Rules of Civil Procedure directs that:

> Findings of fact shall not be set aside unless clearly erroneous . . . . .

Judge Lord specifically found:

> While the parties could have agreed voluntarily to subject formula for payment to arbitration as well as eligibility, there has been no showing that this was done. Porter's submission to the arbitration did not constitute such an agreement (Appendix H, *infra,* p. 119a).

This Court has heretofore held that the "clearly erroneous" rule applies to factual inferences from undisputed facts, as well as to findings from conflicting testimony. *Commissioner v. Duberstein,* 363 U. S. 278, 291 (1960). A finding based on supporting evidence can be reversed only when the reviewing court "is left with the definite and firm conviction that a mistake has been made." *United States v. Gypsum Co.,* 333 U. S. 364, 395; *rehearing denied,* 333 U. S. 869 (1948). The Court of Appeals' own statement of the facts was that there was no "express statement" of agreement when the arbitrator was selected, and that at the hearing Porter "objected to the decision of any problems beyond eligibility." If the "presumption" then is merely an evidentiary device, even with that presumption the Courts' own statement of the facts belies the requisite "definite and firm conviction."

3. The critical error committed below is the Court of Appeals' refusal to determine whether the award rendered actually did draw its essence from the collective bargaining agreement. It concluded that since Porter participated in arbitration as to an event "for which the agreement made

no provision," the "full scope" of the doctrine favoring arbitration requires Porter "to submit to an award which goes beyond the literal meaning of § XX-B . . . ." (Appendix I, *infra*, p. 133a).

This decision does not not comport with prior statements of this Court, and conflicts with the national labor policy of fostering the resolution of disputes through voluntary recourse to arbitration. Section 203(d) Labor Management Relations Act, 1947, 61 Stat. 154, 29 U. S. C. § 173(d); *United Steelworkers of America v. Warrior & Gulf N. Co.*, 363 U. S. 574, 578 (1960); *Textile Workers v. Lincoln Mills*, 353 U. S. 448 (1957).

In *Lincoln Mills* the Federal courts were charged with fashioning a remedy that would effectuate that policy. The instant decision impedes rather than promotes such policy.

Where there is agreement to arbitrate, the courts will order the arbitration of a grievance "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Warrior & Gulf*, 363 U. S. *supra* at 582-583. Arbitration will be ordered if "the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as non-arbitrable because it can be seen in advance that no award to the Union could receive judicial sanction." *John Wiley & Sons, Inc. v. Livngston*, 376 U. S. 543, 555 (1964). This policy is adopted because the "processing of even frivolous claims may have therapeutic values." *United Steelworkers of America v. American Mfg. Co.*, 363 U. S. 564, 568 (1960).

Subsequent to the District Court's Order and Judgment of December 7, 1964, the parties were faced with a variety of unresolved disputes (set forth *supra* at pp. 10-11). Several of these specifically involved problems of eligibility and were arbitrable; some were arguably arbitrable; and some were wholly unrelated to eligibility.

National labor policy would not suggest that Porter, faced with these mixed disputes, should resort to the courts at this stage for separation of the arbitrable from the non-arbitrable. The Third Circuit itself has discouraged such a "resort to interstitial judicial activity . . . when the possibility exists that a labor dispute can be settled without any use of the courts whatsoever." *Local 719, American Bakery & Confectionery Workers of America v. National Biscuit Company,* 378 F. 2d 918, 921-922 (3rd Cir. 1967).

The decision below, if allowed to stand, encourages a party against whom two or more claims are made, even if one is recognized as arbitrable, to shun the course adopted by Porter. The alternatives do not further an efficient use of the courts or a sound development of the policy favoring arbitration. One in Porter's position will refuse to arbitrate either dispute, requiring a judicial determination of the scope of his duty to arbitrate as to both. Or he will proceed to arbitrate the dispute recognized as arbitrable, and abstain from participation or desert the proceedings when his adversary raises matters of contested arbitrability. Or he will insist on two separate proceedings, one for disputes of admitted arbitrability, and the other, even if factually related, for disputes of contested arbitrability.

These alternatives of course present possible ways of dealing with the problem posed by this case. But a decision encouraging these alternatives does not reflect the "judicial inventiveness" called for in *Lincoln Mills* and exhibited by the Third Circuit when presented with a similar problem in the *National Biscuit Company* case.

The Court of Appeals' distinction of *National Biscuit Company,* based as it is on the clarity of the objection to arbitrability, is a meaningless one in the context of the policy promoting resort to voluntary arbitration. *United*

Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U. S. 574, 581 (1960), teaches that:

> The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

To require that process to be hedged with technical statements of legal position cannot promote, but can impede, the progress of that vehicle.

The penalty imposed upon Porter, denial of its right to judicial review, is a deterrent to the intended working of the arbitration process. Such review, although admittedly limited, is necessary and promised:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. *Steelworkers v. Enterprise Corp.*, 363 U. S. 593, 597 (1959).

4. Such a limited review of the arbitrator's award, had it been undertaken in the instant case, would have led to the conclusion that the award was unenforceable.

In the collective bargaining agreement, Porter promised a "Basic yearly pension allowance" to each retired employee "who has reached the age of sixty-five." The arbitrator ruled that, given the hardship of termination, the grievants "are not required to wait to age 65 for pension payments. . . ." This contrary result cannot be justified.

The District Court's holding to this effect was clear and concise:

> This dispute ['time of payment'] was only adjustable by the parties or, of course, by this Court under its Order and Judgment. As such, I hold that grievants who at the time of termination had completed 25 years of continuous service are required to wait until age 65 for pension payments. (Appendix H, *infra,* p. 119a).

The Court of Appeals, in reversing, never attempted to determine whether the award rendered actually did draw its essence from the collective bargaining agreement. It relied solely on a presumed subsequent agreement to have the arbitrator decide all disputes. The only hint of its thinking is found in its discussion of arbitrability, where it states:

> Since the premature termination of their employment displaced the requirement that the employees must reach age sixty-five, the standard of eligibility was now altered and with it the time of accrual of the right to payment. (Appendix I, *infra,* p. 130a).

The Court thus suggests a frustration or impossibility theory as justification for the award. But while termination may have dispensed with the requirement that the *employment* continue up to age sixty-five, it has absolutely no relation to dispensing with the requirement that the employee's *age* reach sixty-five before pension payments start. The elimination of this contractual requirement results in a substantial change in the economic bargain for pensions to which both Porter and the Union had agreed. No theory of impossibility of contractual performance carries with it the imposition of an economic penalty. This, however, is the effect of this award against Porter who had bargained only for the prospective pension payments to certain employees from age sixty-five.

Only a clearly-documented practice could justify the imposition of this substantial incremental burden. No such practice was even discussed by the Court of Appeals. In fact no such practice existed.[4]

Even the limited review of the merits promised in *Enterprise,* therefore, if ever given, will result in reversal of the Court of Appeals and vacating the arbitrator's award.

The result of this case is that a financial burden is imposed on petitioner utterly disproportionate to the obligation for which it contracted, through the enforcement of an arbitrator's award without support in the collective bargaining agreement or practices thereunder. The attempt to justify this result in terms of a simple question of fact contravenes the direction of Rule 52 as previously construed by this Court. The attempt to justify this result in terms of furthering the federal labor policy in fact disserves the policy of the national labor laws and the remedies fashioned by prior decisions of this Court. These errors can be corrected only if Porter's petition is granted.

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4. The record before the arbitrator establishes only one unexplained instance of payment to an employee before retirement age. Cf. Appendix G, *infra,* p. 94a. One unexplained instance, not subsequently repeated, over several years' time in a work force numbering in the thousands can not be construed as a prior "practice."

CONCLUSION.

WHEREFORE, Porter requests that its Petition for Certiorari be granted, and the entire decision be reviewed by this Court. In the alternative, Porter requests that Certiorari be granted for the limited purpose of reviewing that part of the decision precluding Porter from questioning the authority of the arbitrator because of Porter's participation in arbitration.

Respectfully submitted,

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